United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,309

NATIONAL ASSOCIATION OF INTERNAL REVENUE EMPLOYEES,

Appellant,

v.

DOUGLAS DILLON, Secretary of the Treasury,

Appellee

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Appeal From the United States District Court for the District of Columbia

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QUESTION PRESENTED

Whether a Federal district court has jurisdiction to hear and decide the claim of an employee organization that, in excluding a class of employees from the right of collective bargaining and representation, the Secretary of Treasury has exceeded the authority reposed in him by Executive Order 10988 and has denied the organization and the excluded employees due process, where (1) the organization includes as members some employees in the excluded class; (2) the organization is actively seeking to represent employees in the excluded class; and (3) the organization has specifically requested — and been denied in its request — that such employees be permitted to vote in a pending election for an exclusive bargaining representative, in which election the employee organization will appear on the ballot.

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TABLE OF CITATIONS

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant's complaint and amended complaint were filed under 28 U.S.C. §§ 1331 and 2201. It alleged that by ousting special agents employed by the IRS from the benefits of collective bargaining rights otherwise available to their fellow employees, the appellee, the Secretary of the Treasury, had acted without lawful warrant. It sought an injunction against an election for an exclusive representative within the Los Ange-

les, California District, and a declaratory judgment. On January 28, 1965 the District Court for the District of Columbia entered an order dismissing the complaint for want of jurisdiction. (JA 22) The notice of appeal was filed on March 8, 1965. (JA 23)

The jurisdiction of this Court is based on 28 U.S.C. § 1291.

STATEMENT OF THE CASE

On January 17, 1962 President Kennedy signed into law Executive Order 10988, now found at 3 C.F.R. 521, which inaugurated an extensive "Employee Management Relations Program" within the Federal service. In effect, the Order was calculated to legitimize a measure of collective bargaining between the management of Federal agencies and the agencies' employees. Specifically, it sanctioned the existence and operation of "employee organizations" or unions, provided for elections to determine exclusive representatives within appropriate bargaining units, and required Government managers to negotiate with such employee organizations once elected as exclusive representatives.

The appellant, the National Association of Internal Revenue Employees, is such an "employee organization" as is contemplated by the Order. Although it had functioned within the Internal Revenue Service for some 25 years, it immediately began to seek exclusive recognition within the several IRS Districts and to intensify its efforts to bargain collectively, in light of the promulgation of Executive Order 10988. Its efforts were eminently successful. By the date of filing the complaint in the District Court below, NAIRE had won the status of exclusive bargaining representative in numerous Districts and represented some 20,000 IRS employees on this basis. (JA 2)

In the latter part of 1963 the officials of the NAIRE Chapter in Los Angeles, California requested an election within the Los Angeles Dis-

trict of IRS for an exclusive bargaining representative. IRS officials agreed to schedule the election.

Before the election was held, however, local NAIRE officials requested that District officials permit criminal investigators (known formally as "special agents") to vote in the election, and to be included in the projected bargaining unit. Relying on regulations promulgated by the Secretary of the Treasury and his delegates, the District officials rejected NAIRE's request. (JA 7) This rejection was later ratified by one of the Secretary's delegates, the Treasury Department Director of Personnel. (JA 7, 8)

The regulation in question was avowedly based upon Section 16 of the Executive Order, which provides:

> "This order (except section 14) shall not apply to the Federal Bureau of Investigation, the Central Intelligence Agency, or any other agency, or to any office, bureau or entity within an agency, primarily performing intelligence, investigative, or security functions if the head of the agency determines that the provisions of this order cannot be applied in a manner consistent with national security requirements and considerations. When he deems it necessary in the national interest, and subject to scuh conditions as he may prescribe, the head of any agency may suspend any provision of this order (except Section 14) with respect to any agency installation or activity which is located outside of the United States."

The regulation signed by the Appellee's predecessor is found in Chapter E-2, Treasury Department Personnel Manual 13-A. (JA 21) It purports to exclude from general coverage of the Executive Order ". . . the Intelligence Division . . . in the Internal Revenue Service." Subsumed within this overall Intelligence Division are special agents, or criminal investigators. These are IRS employees engaged primarily in the gathering of evidence for use in criminal tax-fraud prosecutions.

These employees have been permitted to join Government unions — and many are members of the appellant employee organization — but the appellee and his delegates have never permitted them to vote in elections or enjoy the benefits of actual collective bargaining.

After the national Treasury official had placed his imprimatur upon the District Director's refusal to allow special agents on the Los Angeles ballot, the appellant sought to avail itself of certain advisory arbitration provisions found in Section 11 of the Executive Order. The Secretary of Labor, in which office the administration of this section is vested, declined to nominate an arbitrator for this purpose. Having exhausted all conceivable forms of administrative redress, appellant thereupon sought judicial relief.

Appellant filed its complaint in the District Court for the District of Columbia. The complaint, as subsequently amended, averred that in ousting criminal investigators or special agents from collective bargaining rights the appellee had exceeded the authority reposed in him by section 16 of the Order. (JA 1, 11) It also contended that it was arbitrary and capricious to exclude special agents on the ground that their activities were related to considerations of "national security," and that to deprive appellant of the opportunity to represent the agents on such unreasonable grounds constituted a deprivation of appellant's due process. Appellant sought a declaration of its rights under the Order and Constitution, and an injunction of the pending Los Angeles election until a final adjudication of the case. The Los Angeles election was still pending when the action below was initiated and has in fact never yet been held.

It was agreed between counsel that they would attempt to dispose of the litigation by cross motions for summary judgment. Appellant filed such a motion, and appellee later filed a motion to dismiss the complaint for want of jurisdiction or, alternatively, for summary judgment. The appellee's motion was heard before Judge Burnita Matthews. Ruling

from the bench, she granted appellee's motion to dismiss for lack of jurisdiction. The order of dismissal was entered on January 28, 1965. (JA 22)

From this order appellant has taken its appeal to this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Art. III:

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."

28 U.S.C. § 1331(a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Executive Order 10988, 3 C.F.R. 521 (promulgated January 17, 1962):

> "Sec. 16. This order (except section 14) shall not apply to the Federal Bureau of Investigation, the Central Intelligence Agency, or any other agency, or to any office, bureau or entity within an agency, primarily performing intelligence, investigative, or security functions if the head of the agency determines that the provisions of this order cannot be applied in a manner consistent with national security requirements and considerations."

STATEMENT OF POINTS

The District Court erred in dismissing appellant's complaint for want of jurisdiction because:

(1) "Federal question" jurisdiction was present on the face of the complaint.

(2) The doctrine of sovereign immunity was inapplicable to appellant's action.

(3) Appellant had adequate standing to sue.

SUMMARY OF ARGUMENT

A Federal district court has jurisdiction to hear and decide the character of claim advanced by appellant below. Appellant's claim, as framed in its complaint, raised a "federal question." The federal question was amply sustained on any of three grounds. (1) Appellant's contention that appellee had exceeded the authority reposed in him by Executive Order 10988 was a claim "arising under" the selfsame Order, hence arising under a law of the United States in the sense of Article III of the Constitution. (2) Appellant's contention that appellee's actions deprived it of due process arose under the Constitution. (3) Appellant's contention also arose under Federal "common law" in that appellee was alleged to have flouted the rule of Federal administrative law that an agency is absolutely bound by its own regulations (and, correlatively, any Executive Order to which it is subject).

Nor was appellant's claim barred by the doctrine of sovereign immunity. The action was neither nominally nor effectively against the Sovereign. It was based squarely on the theory of *ultra vires* conduct by the individual appellee, plainly falling within the rule of *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), which permits such actions to be brought against individual Government officials.

Finally, there is no doubt as to appellant's standing to sue. As an unincorporated association it possesses the requisite standing to assert the interests of its individual members. *NAACP v. Alabama*, 357 U.S. 449 (1958). Additionally, appellant sued to establish its own interests as an entity in representing special agents who had been excluded from collective bargaining rights by the action of the appellee.

ARGUMENT

The District Court Had Jurisdiction To Hear and Decide the Claims Presented by Appellant.

The sole question presented on this appeal is whether the District Court erred in dismissing appellant's complaint for want of jurisdiction.[1] In order to decide whether the trial court has jurisdiction to entertain the claim it is necessary to assess and reconcile three more or less

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[1] This is clear from the order entered by the trial court, which was in terms a denial of appellant's motion for summary judgment and a granting of appellee's motion to dismiss. This portion of appellee's alternative motion was rooted entirely in the appellee's contention that the Court lacked jurisdiction to entertain the claim. Furthermore, in the posture of the case at the time of ruling, it is clear that a motion to dismiss on the merits would have been tantamount to an adjudication that the Executive Order granted to agency heads the authority to exercise their powers under section 16 in an arbitrary and capricious manner. This is so because appellant had contended in its pleadings and statement of material facts (filed pursuant to local Rule 9(h)) that the actual functions of special agents were factually unrelated to "national security." This factual allegation was controverted, to a degree, by the appellee's own statement, see JA 20, and this dispute over a material fact necessarily rendered summary judgment improper. Rule 56, Federal Rules of Civil Procedure; *White Motor Co. v. United States*, 372 U.S. 253 (1963). Moreover, whether an executive order may constitutionally empower an Executive official to function arbitrarily and capriciously is an issue not free of doubt, and has expressly been pretermitted by the Supreme Court. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 136 (1951). It is inconceivable that the District Court would have made such a ponderous decision without opinion or any written expression of its holding — and in flagrant violation of Rule 56 as well. The Court's action was obviously therefore nothing other than a dismissal for want of jurisdiction.

distinct doctrines evolved by our Federal law. They are the notions of (1) "federal question" or "arising under" jurisdiction, (2) Sovereign immunity and (3) standing to sue. Appellant's contention here is that there was indeed a proper "Federal question" which emerged from the pleadings and afforded a proper predicate for jurisdiction; appellant's action was not essentially against the Sovereign, hence not barred by the immunity doctrine; and appellant had adequate standing to sue, since its interests as an organization were directly and prejudicially affected by the official action complained of.

A. "Federal Question" Jurisdiction Was Present.

Article III of the Constitution provides that federal courts may be given jurisdiction over "Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made ... under their authority." Congress has conferred this jurisdiction upon the federal district courts in language that has remained virtually intact since 1875, and which parallels that of the so-called "arising under" grant of judicial power in the Constitution. 18 Stat. 470 (1875), 28 U.S.C. 1331(a) Cases falling within this jurisdictional grant, as distinguished from others such as diversity of citizenship, are considered to be "Federal question" or "arising under" cases.[2] The initial problem in the instant case is to decide whether it fell within this general classification.

To see whether "arising under" jurisdiction is present it is first necessary to examine the well pleaded portions of the complaint. *Bell*

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[2] The literature on "federal question" jurisdiction is, of course, voluminous. See generally, London, "Federal Question" Jurisdiction — A Snare & A Delusion, 57 Mich. L. Rev. 835 (1959); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953); Fraser, Some Problems in Federal Question Jurisdiction, 49 Mich. L. Rev. 73 (1950); Forrester, Federal Question Jurisdiction & Section 5, 18 Tul. L. Rev. 263 (1943): Forrester, The Nature of a Federal Question, 16 Tul. L. Rev. 363 (1942); Moore, Fed. Practice & Procedure 622-635; Wright, Federal Courts 48-50.

v. Hood, 327 U.S. 678 (1946); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913).

The complaint in the case at bar alleged (1) that the appellee, an official of the Federal government, had exceeded the authority given to him by the Executive Order, thus acting without lawful warrant and, moreover, (2) that his denial to appellant of the right to represent special agents was a denial of due process.

To support jurisdiction it is not necessary that the federal claim be valid, only that it not be "clearly untenable." Mishkin, The Federal "Question" in the District Courts, 53 Colum. L.Rev. 157, 166 (1953).

A claim allegedly grounded on a federal question cannot be dismissed for lack of jurisdiction unless it "clearly appears to be . . . wholly insubstantial and frivolous." *Bell v. Hood, supra* at 681; *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933); *Lee v. Hodges*, 321 F.2d 480, 483 (4th Cir. 1963).

That the claims at bar were not frivolous, however, is conclusively demonstrated by a series of three Supreme Court decisions.

In *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), the Supreme Court decided a case whose jurisdictional basis was indentical to that of the case at bar. There, the Attorney General, purporting to act under authority of Executive Order 9835, had designated the various petitioning organizations as subversive groups, on the recommendation of the Loyalty Review Board. The petitioners had sued for declaratory relief, alleging that they were charitable and civic groups. The trial court dismissed for want of jurisdiction and the Court of Appeals affirmed. But the Supreme Court reversed, holding explicitly that petitioners' contention that the Attorney General had gone beyond the authority of the Executive Order presented an issue within the jurisdiction of a Federal Court.

The Court later reemphasized this holding in *Peters v. Hobby*, 349

U.S. 331 (1955), where it reviewed a petitioner's disbarment from Federal employment by the Secretary of Health, Education and Welfare, acting in concert with the Loyalty Review Board. The complaint alleged that the disbarment had been in violation of Executive Order 9835, and constituted a denial of due process to the plaintiff as well. The Court made a detailed analysis of the Order, including its history, the report of the President's Temporary Commission on Employee Loyalty, which had recommended its promulgation, and the language of regulations established by the Board. The Court concluded that the disbarment procedures did not square with the authority bestowed by the Order. This was the sole basis of its decision to reverse the lower court's dismissal of the action. The Court stated:

> "Agencies, whether created by statute or Executive Order, must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority." 349 U.S. 345

The most recent Supreme Court pronouncement on the elements of "federal question" jurisdiction in relation to the claim of a private party against a Federal Government official is *Wheeldin v. Wheeler*, 373 U.S. 647 (1963). Plaintiff here sued in a Federal district court, alleging that the defendant, a staff investigator for the House Un-American Activities Committee, had, while acting under color of his office, caused a subpoena to be served upon the plaintiff at his employment, thereby leading to his unemployment. Though the plaintiff never responded to the subpoena, nor had he ever been cited for contempt as a result, he alleged that the defendant had acted without authorization from the committee. The majority of the Supreme Court, construing the complaint as resting principally upon the Fourth Amendment, concluded that in light of the undisputed facts as they appeared on argument of the case no substantive Federal cause of action was established. However, they noted that "on the face of the complaint the federal court had jurisdiction." 373

U.S. 649 The case came before the Supreme Court after two hearings by the trial court, the second after reversal and remand by the Court of Appeals for the Ninth Circuit. A minority of three justices felt that the case should have been remanded again, for reasons discussed in the footnote; but even in the view of the majority, which affirmed the second dismissal, it is obvious that it would have been deemed error to have dismissed the complaint for want of jurisdiction, as was done by the District Court in the case at bar.

There are at least three possible rationales for the jurisdiction of the courts in the *Anti-Fascist Committee* and *Peters* cases. One is that the official acts complained of were allegedly violative of the Federal decisional or "common law." It is well settled that an executive agency is absolutely bound to abide by its own regulations. E.g., *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). This decisional rule applies, *a fortiori*, to require an agency to abide by an Executive Order to which the agency is subject. Thus, if an agency official is alleged to have flouted the terms of an Order by which he is bound, this claim is fairly based upon a decisional law "of the United States." Such a claim, in turn, obviously "arises under" a "law of the United States" for the purposes of 28 U.S.C. 1231(a).

The second rationale is more simple, namely, that the allegation of an infringement of the plaintiff's constitutional rights in and of itself sufficed for "federal question" jurisdiction.

The second rationale may be the one preferred by the Supreme Court itself. Mr. Justice Brennan, writing for the trio of dissenting justices in *Wheeldin*, observed that the Court had "never decided the question" whether a claim based on Federal "common law" was one "arising under" Federal law for the purposes of Article III and 28 U.S.C. § 1331(a). 373 U.S. 665 If this be true, it follows that the sole predicate for Federal question jurisdiction in the *Joint Anti-Fascist* and *Peters* cases was the

claim that the Federal officials had acted unconstitutionally, although in neither was the constitutionality of the acts actually adjudicated. Buttressing this approach is the majority opinion of *Wheeldin*, which found Federal question jurisdiction on the fact of a complaint alleging unconstitutional action by the investigator. Assuming *arguendo* that this is the correct rationale, it can readily be seen that the complaint in the case at bar sufficed to make out federal question jurisdiction. If the allegations of unconstitutional action on the part of the Attorney General in *Joint Anti-Fascist*, the Secretary of Health, Education, and Welfare in *Peters* and an individual investigator in *Wheeldin* were sufficient to establish jurisdiction, it inexorably follows that the allegation of unconstitutional action by the appellee was sufficient to establish the same kind of jurisdiction in the case at bar.

Assuming, on the other hand, that Federal decisional or "common law" is a "law of the United States" for jurisdictional purposes, it is equally clear that the complaint in the instant case established the requisite jurisdiction, since it alleged precisely the same type of usurpation or abuse of authority as was involved in the *Joint Anti-Fascist* and *Peters* decisions. In all three the complaint explicitly averred that the defendant federal official had acted beyond the scope of authority bestowed in him by an executive order. If this alleged infraction of Federal "common law" was enough for jurisdiction in the earlier decisions, it was enough in the instant case.

The third possible explanation is that the assertion of a right claimed under an Executive Order in and of itself generates a question "arising under" Federal law. That this is a valid proposition is also strongly suggested by the decisions of the Supreme Court in *Joint Anti-Fascist Committee* and *Peters*.

In both cases there were claims of unconstitutional action that the Federal officials in question had violated the plaintiff's constitutional rights. In neither, however, were the constitutional claims actually ad-

judicated. The cases went off, instead, solely on the Court's construction of the Executive Orders pursuant to which the defendant officials had purported to act. In the *Peters* case, at least, the claim that the Federal official had exceeded the authority granted by the Executive Order was clearly articulated in the complaint. See *Peters v. Hobby* at 349 U.S. 331, 337. The complaint alleged that the action taken against the petitioner was "in violation of Executive Order 9835 and the Constitution of the United States . . . ."

Since the complaint was expressly rooted in the Executive Order, and the interpretation thereof by the Court was the sole basis for its decision, it is quite possible that the Supreme Court deemed the claim under the Order to be one "arising under" Federal law. In a sense, the proposition is almost self-evident. It has long been established that an Executive Order, if promulgated under the President's ultimate constitutional or statutory authority, is itself entitled to the full force of law. *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964); see also *United States v. Mersky*, 361 U.S. 431 438 (1960); *Lichter v. United States*, 334 U.S. 742, 785 (1948); *United States v. Excel Packing Co.*, 210 F.2d 596 (10th Cir. 1954), *cert. denied*, 348 U.S. 817; see also *Udall v. Tallman*, 380 U.S. 1 (1965); *Colorado Anti-Discrimination Comm. v. Continental Air Lines*, 372 U.S. 714, 725 (1963). So far as appellant has discovered, no Federal court has ever held that a claim may not arise under an Executive Order for purposes of "federal question" jurisdiction. At least one court, on the other hand, has quite recently explicitly recognized that such a claim does arise under 28 U.S.C. § 1331(a). *Farmer v. Philadelphia Elec. Co.*, 215 F. Supp. 729, 732 (E.D. Pa.1963), *aff'd*, 329 F.2d 3, *supra*.

> "[I]t is possible to construe the complaint . . . as claiming a cause of action created by an Executive Order. Under this . . . view . . . plaintiff manages to get over the jurisdictional hurdle, for . . . he has created jurisduction in this court to determine whether such a claim is well founded . . . ."

It is perhaps unfortunate that the Supreme Court did not discuss the underlying theory of "federal question" jurisdiction which it implicitly found present in the *Joint Anti-Fascist Committee* and *Peters* cases. The point is academic, however, since the two cases were perfect analogues of the case at bar so far as jurisdictional theory is concerned, and if "federal question" jurisdiction was present there it necessarily follows that it is present here. If the cases are to be construed as having been bottomed, for jurisdictional purposes, on a claim under an Executive Order, an identical claim is present in the instant case. If jurisdiction was rooted in an allegation of a denial of constitutional rights, precisely the same character of allegation is present in the appellant's claim. If the constitutional allegations in *Peters* and *Joint Anti-Fascist Committee* — and certainly in *Wheeldin* — were not "frivolous," *a fortiori* the constitutional allegation here was not "frivolous."[3] Finally, if jurisdiction in the two cases was arguably based on a claim under Fed-

[3] Before the trial court the appellee contended, *albeit* not in terms, that the constitutional claim alleged in appellant's complaint was "frivolous." Appellee departed from the premise that "government employ" is not a "property" interest entitled to due process of law. Characterizing appellant's interest in this proceeding as "possible participation by a government employee in the formulation of personnel policies," appellee then argued that if government "employ" itself is unentitled to the protection of due process, *a fortiori*, "a denial of possible participation in the formulation of personnel policies with respect to such employ cannot constitute a violation of the due process clause." There are two fatal defects in this argument. First, the teaching of *Bailey v. Richardson*, 86 U.S. App. D.C. 248, 182 F.2d 46, *aff'd by equally divided court*, 341 U.S. 918, on which appellee relied for its basic premise, has subsequently been annihilated. In the subsequent decisions of *Wieman v. Updegraff*, 344 U.S. 183 (1952) and *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), the Supreme Court held that public employee's interest in his job is an interest subject to the protections of "due process." To that extent *Bailey* has unquestionably been overruled.

Secondly, appellee has misstated appellant's interest in this proceeding. Appellant's interest is twofold. It asserts the interests of those NAIRE members who are special agents in voting in the election of exclusive bargaining representatives, and in being represented by such representatives. It also asserts its interest as an entity in being permitted to represent special agents along with other classes of IRS employees.

eral administrative "common law," as suggested *supra* at pp. 11-12, exactly the same analysis is available in support of appellant's complaint.

On any view of the controlling precedents, then, it follows that appellant's complaint established the requisite "federal question" jurisdiction, thereby compelling the District Court to entertain appellant's claim.

B. Appellant's Claim Was Not Barred by the Doctrine of Soverein Immunity

Appellee's principal reliance below seems to have been upon the theory that appellant's suit is barred by the doctrine of sovereign immunity. (See defendant's memorandum of points and authorities 2, 4, 7.) It is fundamental, of course, that the United States may not be sued without its consent. *United States v. Tillou*, 8 Wall. 484 (1867). The extent to which the sovereign immunity doctrines insulates Federal officials, while acting in their official capacity, is an "extraordinarily difficult question," Wright, Federal Courts 62, for which the precedents have established no easy test.

The appellee relied below upon the decision in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949) and *Dugan v. Rank*, 373 U.S. 609 (1962). This reliance was unquestionably misplaced.[4]

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[4] The law of sovereign immunity is a vexatious subject, perhaps not always lucidly rationalized in the decisions. See generally Davis, Sovereign Immunity in Suits Against Officers for Relief Other Than Damages, 40 Corn. L.Q. 3 (1954); 3 Davis, Administrative Law Treatise c. 27 (1958). Long before *Larson*, however, it was firmly established that "[g]enerally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); see also *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *Stark v. Wickard*, 321 U.S. 288 (1944); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 621-22 (1912); *Scully v. Bird*, 209 U.S. 481, 489 (1908). This fundamental principle of law was in no way altered by either *Larson* or *Dugan*, both of which focused solely on the propriety of permitting the litigation of claims which challenged specific property rights of the Government.

Larson was something of a doctrinal bench mark in the torturous evolution of law concerning the reach of sovereign immunity. Plaintiffs sought to restrain the War Assets Administrator from conveying certain Federal coal deposits to a third party, and to compel, by mandatory injunction, the conveyance of the coal to plaintiffs. The merits of plaintiffs' claim, rooted in a contract theory, remained unresolved throughout the life of the litigation. The Supreme Court upheld dismissal of the action for want of jurisdiction. It did so because there was no allegation in the complaint that the defendant Federal official had acted beyond his statutory or constitutional authority but, at most, that he had simply acted wrongly. According to Justice Frankfurter, who dissented, this test was devised at the expense of some earlier precedents, notably *United States v. Lee,* 106 U.S. 196 (1882). In any event, the majority evidently intended that the test would be applicable only in those cases where "specific relief," such as ejectment or recovery of specific property, was sought. The majority went on to hold, however, that even as to this class of litigation:

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign . . . [W]here the officer's powers are limited by statute, his actions beyond these limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do, or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief." 337 U.S. 689

Later, in the *Joint Anti-Fascist Committee* case, the respondent argued before the Supreme Court that the *Larson* test applied to bar the action there on grounds of sovereign immunity. The Court, of course, held otherwise. In fact it explicitly broadened the *Larson* test to insulate from the sovereign immunity barrier those cases in which federal

officials acted beyond the scope of authority vested in them by Executive Orders as well as by statutes or constitutional provisions. The Court said:

> "The respondents are not immune from such a proceeding. Only recently, this Court recognized that 'the action of an officer of the sovereign can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual . . . if it is not within the officer's statutory powers or, if within the particular case, are constitutionally void . . .' The same is true here, where the acts complained of are beyond the officer's authority under the Executive Order." (Emphasis supplied) 341 U.S. 140

The instant case is thus not barred by sovereign immunity because it is clearly grounded on the theory that the federal official in question had acted beyong his proper authority, both constitutionally and, more patently, in terms of Executive Order 10988. If there were ever any doubt about the latter, it was dispelled by the amended complaint which alleged, *inter alia*, that the defendant's

> "exclusion of the said criminal investigators from coverage of Executive Order 10988, through promulgation of the aforesaid regulation and its application by his agents to the criminal investigators within the Los Angeles District constitutes a refusal on the part of Defendant to follow and abide by the terms of Executive Order 10988, and specifically Section 16 thereof." (JA 12-13)

Since appellant's action was expressly predicated on the allegation of *ultra vires* conduct by appellee, it necessarily follows that the action was neither nominally nor in effect against the sovereign. The doctrine of sovereign immunity should not therefore have been employed to prevent appellant from undertaking to prove its contentions, and to bar any decision on the merits.

C. Appellant Had Standing To Sue

The law of "standing" is as complex and difficult as the other two doctrines discussed here. Some basis propositions are nonetheless tolerably clear. "Standing" is a concept developed by the courts, along with certain others, for limiting the judicial power, thereby insulating it to a degree against debasement. See, *e.g.*, Jaffe, *Standing To Secure Judicial Review: Private Actions* 75 Harv. L.Rev. 255, 304 (1961). On the other hand, "[n]either the competences of the judicial power nor its dangers can be strictly related to a standing requirement." *Id.* at 305.

Appellee argued below that appellant's action should have been dismissed for lack of the requisite standing. This argument proceeded in part on appellee's fallacious understanding of the factual nexus or "interest" between appellant and the substantive legal questions it was trying to adjudicate. See footnote 3, *supra*.

One is said to have greater or less "standing" depending on the quality and intensity of the litigant's interest in the substantive legal questions sought to be adjudicated.

It has sometimes been rather loosely stated that standing presupposes an injury to a "legally protected" interest. *E.g.*, *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137 (1937). Taken literally, the circularity of such a definition of standing is transparent, it would seem, and has been duly remarked by commentators. *E.g.*, Hart & Wechsler, Federal Courts and the Federal System 174; Wright, Federal Courts 38. Obviously, a litigant's interest is not "legally protected" unless he can assert it in court; but to have standing to assert it, it must be "legally protected." The courts, on the other hand, have accepted cases in which the plaintiff clearly could claim no invasion of his legally protected interests. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942), ("these private litigants have standing only as representatives of the public inter-

est . . . ."); *Associated Industries, Inc. v. Ickes*, 134 F.2d 694 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707.

Whether, as has been suggested, a direct personal injury is unnecessary in cases affected with a strong "public interest," see *Jaffe, supra*, 75 Harv. L. Rev. 255, 272-288, 302-305, is a question of only academic import here. Assuming that some character of direct interest adversely affected by the appellee was a prerequisite for appellant's standing below, such an interest was obviously present, and of sufficient significance to afford "standing" under virtually any view of the law.[5]

The appellant is, of course, an unincorporated association. As such it enjoys the capacity to sue in its own name under Rule 17(b) of the Federal Rules of Civil Procedure. *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922).

The requisite "interest" for standing has two aspects. The appellant's members are IRS employees. Some are special agents. One aspect of the appellant's interest is the interest of its members who are special agents and desire both to participate in the long-delayed Los Angeles election and to enjoy the full benefits of collective bargaining

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[5] Even if appellant interests had not been directly injured by the appellee's actions, appellant would still insist that the Court should entertain the action because of its inherent importance or "public interest," analogously to those cases which have been entertained even absent a direct interest by the litigants. See *Jaffe, supra*, and cases cited. This is an altogether permissible point of view since the requirement of "standing" is apparently not jurisdictional in character, as are a "case or controversy," "federal question" and even sovereign immunity. *Power Reactor Dev. Co. v. Int'l. Union of Elec. Workers*, 367 U.S. 396 (1961); *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953).

The public importance of the jurisdictional question posed in the case at bar is undeniable. It is of great significance to all employee organizations in the Federal service to know precisely to what extent disputes arising under the program envisaged by Executive Order 10988 are justiciable disputes, amenable to judicial review. A related question arising under the program is now pending before this Court, see *Manhattan-Bronx Postal Union v. Gronouski*, App. No. 18,882, but the basic jurisdictional issue posed here has never before been adjudicated in any Court.

under the Executive Order as do their co-workers. It is established law that an unincorporated association such as NAIRE has standing to assert the interests of its individual members. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Joint Anti-Fascist Comm. v. McGrath, supra.* The reason for this, as well stated by the Supreme Court in the *NAACP* decision, is simply that ". . . [an association] is the appropriate party to assert these rights, because it and its members are in every practical sense identical." 357 U.S. 449, 459

A second interest, of equal importance, is the interest of NAIRE *qua* NAIRE in representing special agents along with their fellow IRS employees.

Both of these "interests" are directly and adversely affected by the acts of the appellee, which appellant contends to be beyond his properly delegated or constitutional authority. The Treasury regulation in question has been administratively determined to bar the special agents from appearing on the Los Angeles ballot for the Los Angeles election, in which appellant appears as a candidate for the status of exclusive bargaining representative. Through the force of this regulation appellant, and all other employee organizations, will be similarly thwarted in any future efforts to secure the presence of special agents on the ballots. There is, in every meaningful sense, a "real and substantial controversy," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 229, 240 (1937), existing between the parties, fully ripe for judicial resolution. Thus the trial court erred if it rested its dismissal on the theory of a lack of "standing."

CONCLUSION

For the foregoing reasons, the District Court erred in granting appellee's motion to dismiss for want of jurisdiction. This order should therefore be reversed.

Respectfully submitted,

GLENN R. GRAVES

625 Washington Building
Washington, D. C.

Attorney for Appellant

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JOINT APPENDIX

[Filed March 20, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF INTERNAL REVENUE EMPLOYEES, an unincorporated association

Plaintiff

v.

DOUGLAS DILLION, Secretary of the Treasury

Defendant

Civil Action No. 683-64

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This Court has jurisdiction over this complaint under 28 U.S.C. §1331(a) and 28 U.S.C. §§2201 and 2202.

2. Plaintiff National Association of Internal Revenue Employees is a nonprofit, unincorporated association, comprised of employees of the Internal Revenue Service. It is an "employee organization" as that phrase is used in Executive Order 10988, described in more detail below.

3. Defendant Douglas Dillon is Secretary of the United States Treasury Department. Acting in this capacity he has implemented Executive Order 10988 in a fashion such as to impinge upon what plaintiff deems its legal rights thereunder, thus giving rise to the instant suit.

4. On January 17, 1962, the President of the United States promulgated the aforesaid Executive Order 10988. The Order asserts as its policy the promotion of collective bargaining within the Federal service, creates organizational and representational rights among Federal employees, and imposes upon the officials of the several

agencies and departments of the Executive branch of Government the duty of implementing this policy and the specific obligations, inter alia, of permitting employees to vote for representatives, granting exclusive recognition to freely chosen representative, under specified circumstances, and bargaining with such representatives. "Employee organizations" such as the Plaintiff are expressly sanctioned as representatives by the Order.

5. Pursuant to the authorizations of the aforesaid Executive Order, Plaintiff is actively engaged in organizing and representing employees of the Internal Revenue Service, a bureau of the Department of Treasury. Plaintiff, in the course of elections held in various Districts of the Internal Revenue Service has been designated as exclusive representative for approximately 20,000 Internal Revenue Service employees.

6. Section 16 of the aforesaid Order renders the Order as a whole inapplicable to certain Federal agencies. In addition, it grants limited authority to heads of Federal agencies to exclude other categories of employees from the purview of the Order if their coverage is determined to be incompatible with considerations of national security. In pertinent part Section 16 provides that the Order shall be inapplicable to ". . . any office, bureau or entity within an agency, primarily performing intelligence, investigative, or security functions if the head of the agency determines that the provisions of this Order cannot be applied in a manner consistent with national security requirements and considerations."

7. Though the precise scope of the "national security" exclusionary standard in Section 16 is not delimited in terms therein, ordinary reason, the common import of its terms and the judicial construction of identical language in similar legislative expressions, indicate that the aforesaid phrase "national security" is confined to matters directly concerned with the protection of the Nation from internal subversion or foreign aggression.

8. Defendant, acting in his official capacity, has caused to be published and promulgated a regulation which purports to exclude from the benefits of Executive Order 10988 certain designated employees within the Internal Revenue Service, specifically ". . . the Inspection Service, the Intelligence Division and the Enforcement Branch of the Alcohol and Tobacco Tax Division in the Internal Revenue Service." The foregoing regulation is found in Chapter E-2 of the Treasury Personnel Manual, section 13-A.

9. An election is now pending in the Los Angeles, California district of the Internal Revenue Service, the object of which will be a selection by employees therein of an exclusive representative. Plaintiff and the American Federation of Government Employees, another employee organization, are the competing candidates which will appear on the ballots of the election. The precise date of the election is indefinite at this time because of an unresolved dispute among the employee organizations and the Internal Revenue Service as to the composition of the units within which the election shall be conducted, a matter irrelevant to the instant suit.

10. In the course of discussions with Internal Revenue Service management concerning the forthcoming Los Angeles District election, Plaintiff requested that the criminal investigators employed in the Los Angeles district be permitted to vote in said election and participate in the organizational and representational rights afforded by Executive Order 10988. A copy of this request appears as exhibit "A:" annexed hereto and incorporated herein by reference. The request was denied by an agent of the Internal Revenue Service management, R. A. Riddell, Director of the Los Angeles District. This decision, on review, was affirmed by Amos N. Latham, Jr., Director of Personnel for the United States Department of Treasury, acting as representative of the Defendant. A copy of this affirmance is annexed hereto as exhibit "B," and incorporated herein by reference. The aforesaid agents of the Defendant rejected the Plaintiff's request on the basis of the afore-

said Treasury Department regulation found in section 13-A of Chapter E-2, Treasury Personnel Manual, which regulation has thus been administratively determined to exclude Internal Revenue Service criminal investigators from coverage of Executive Order 10988.

11. In purporting to exclude the said criminal investigators from coverage of Executive Order 10988, through promulgation of the aforesaid regulation and its application by his agents to the criminal investigators within the Los Angeles district, the Defendant has misinterpreted and misapplied the exclusionary standard imposed upon him, as an agency head, by Section 16 of the Order. Neither criminal investigators generally nor those employed in the Los Angeles area are engaged in any operation or assignment for the United States Government whereby their inclusion within the program contemplated by the said Order would imperil considerations of national security or be incompatible therewith. Instead, Plaintiff is informed and believes that their principal function is to gather data pertinent to criminal tax fraud prosecutions; and neither this objective nor any work incident thereto directly involves protection against internal subversion of the Nation or foreign aggression. The Defendant's exclusion of the said investigators is arbitrary, capricious and unreasonable, and inconsonant with the substantive exclusionary standard imposed upon Defendant by Section 16 of Executive Order 10988.

12. Unless the meaning of the exclusionary standard expressed in Section 16 of the aforesaid Executive Order is judicially determined, the Defendant's erroneous regulation will continue to be enforced in derogation of the said Order and the rights of both the Internal Revenue Service criminal investigators and Plaintiff, as an employee organization seeking to represent the said criminal investigators. Additionally, unless the said Section 16 is now adjudicated, the criminal investigators in the Los Angeles district will be deprived of their right to vote and participate in the forthcoming election therein, and Plaintiff will be denied its right as an employee organization to

be designated by the said criminal investigators as their exclusive representative, and to represent the said criminal investigators.

13. Between Plaintiff and Defendant there is a present, genuine and irreconcilable dispute as to the proper meaning of the exclusionary language found in Section 16 of Executive Order 10988, as set out above. Plaintiff has attempted in vain to persuade Defendant to modify, revise or rescind his exclusionary regulation as cited above. Plaintiff, moreover, has sought to avail itself of the advisory arbitration procedures provided in Section 11 of the said Executive Order 10988, having requested the Secretary of Labor to nominate an impartial arbitrator to render an opinion as to the propriety of the Defendant's administrative ouster of criminal investigators from the benefits of the collective bargaining system contemplated by the Order. The Secretary of Labor has denied the request for advisory arbitration. A copy of his decision is incorporated herein as exhibit "C." Plaintiff has therefore exhausted all conceivable modes of administrative review of the existing controversy between it and Defendant.

WHEREFORE, premises considered, Plaintiff prays

1. That this Court interpret the exclusionary language of Section 16, Executive Order 10988, declaring the rights of the litigants in light thereof.

2. That this Court declare the Defendant's administrative exclusion of Internal Revenue Service criminal investigators to be an impermissible and improper application of the exclusionary power granted in Section 16 of Executive Order 10988, and hence unlawful.

3. That this Court issue an order restraining Defendant and his agents from conducting an election within the Los Angeles District of the Internal Revenue Service, to determine whether plaintiff or another employee organization shall be the exclusive representative therein, unless and until this Court has determined whether criminal investi-

gators may vote in said election and enjoy the rights created in Executive Order 10988.

4. For such other relief as to this Court seems just and proper.

Glenn R. Graves
Attorney for Plaintiff

[Exhibit A]

National Association of Internal Revenue Employees
Chapter 15
Los Angeles, California
December 7, 1963

Director of Internal Revenue
Los Angeles, California

Dear Mr. Riddell:

As President of NAIRE, Chapter 15, an employee organization seeking exclusive recognition of all Units in the forthcoming election in the Los Angeles District, I hereby propose and request that in this election the Internal Revenue Service criminal investigators, Civil Service number 1811, be permitted to vote and be afforded the full protection of the employees organizational rights covered by Executive Order 10988.

I further request that such employees be deemed professional for the purpose of their participation in the election.

I shall greatly appreciate any official opinions on this matter at your earliest convenience.

Sincerely yours,

George T. Gilman
President, Chapter 15

[Exhibit B]

TREASURY DEPARTMENT
Washington, D.C.
Dec. 31, 1963

Dear Mr. Graves:

In your letter of December 30, 1963, you asked for a written determination as to whether a letter written by Los Angeles District Director of the Internal Revenue, Robert A. Riddell, on December 18 represents a proper application of existing Treasury regulations. Mr. Riddell had stated in his letter that the provisions of Executive Order 10988 (except for section 14) do not apply to Internal Revenue employees in Inspection, Intelligence, and Alcohol and Tobacco Tax enforcement activities. He further stated that even though the National Office of Internal Revenue is now considering designating additional positions, including that of Criminal Investigator, as professional employees, Criminal Investigators may not be included in any unit because of the restriction in Section 13A of Chapter E-2 of the Treasury Personnel Manual.

Mr. Riddell has correctly interpreted the regulations of the Treasury Department in this respect. As you know, section 16 of Executive Order 10988 states "This order (except section 14) shall not apply to the Federal Bureau of Investigation, the Central Intelligence Agency, or any other agency, or to any office, bureau of entity within an agency, primarily performing intelligence, investigative, or security functions if the head of the agency determines that the provisions of this order cannot be applied in a manner consistent with national security requirements and considerations." The Secretary of the Treasury as head of this agency has determined that certain positions in the Treasury Department were such that the provisions of Executive Order 10988 could not be applied in a manner consistent with national security requirements and considerations. This determination

is reflected in Section 13A of Chapter E-2, the Treasury Department's regulations governing employee-management cooperation.

If this office can be of any further help to you in this matter, please do not hesitate to call or visit us.

Sincerely,

Amos N. Latham, Jr.
Director of Personnel

[Exhibit C]

ASSISTANT SECRETARY OF LABOR
Washington
February 28, 1964

Mr. Glenn R. Graves
644 Washington Building
15th Street and New York Avenue N.W.
Washington, D. C.

Re: 73-IRS-3
76-IRS-4
Los Angeles, Calif.

Dear Mr. Graves:

The Department of Labor has carefully considered the positions taken by the parties concerning the requests of the American Federation of Government Employees, 73-IRS-3, and that of your client, the National Association of Internal Revenue Employees, 76-IRS-4.

The question of exclusion of criminal investigators of the Internal Revenue Service, 76-IRS-4, by the Secretary of the Treasury under Section 16 of Executive Order 10988 is not subject to arbitration as a "related issue" under Section 11. Section 16 determinations are

clearly the responsibility of the head of each agency or department in the performance of his statutory obligations as agency head, and not subject to review under this Order.

The advisory arbitration machinery provided by Section 11 is a limited one. It is designed solely to provide recommendations with regard to unit and majority status problems involving those employees covered by the Order as determined by the agency head.

With respect to the second case, 73-IRS-3, a detailed review of the request of the American Federation of Government Employees, the correspondence submitted by both organizations and the Treasury Department indicates that the American Federation of Government Employees filed a timely request for exclusive recognition and for the nomination of arbitrators, supported by an adequate showing of interest, in a prima facie appropriate unit.

The purpose of Section 3(c)(2) of the Department's rules for the nomination of arbitrators is to permit an agency to prepare for and to conduct an election free from last minute requests of other employee organizations. To give effect to its obvious intent, the word "date" should be interpreted as the actual date of the election. The record reveals, however, that AFGE request was made more than 10 days before the scheduled election date in which the Internal Revenue Agents were to vote and, furthermore, that no election involving this group has been held. Accordingly, the Department will submit nominations of arbitrators to the parties, pursuant to the customary procedures, in due course.

Your request that the issue of alleged "bad faith and ulterior motives" be submitted to the nominated arbitrator is denied as inappropriate.

By direction of the Secretary.

James J. Reynolds
Assistant Secretary of Labor

cc:

Mr. G. D'Andelot Belin
General Counsel
U. S. Treasury Department
Washington 25, D.C.

Mr. Amos N. Latham, Jr.
Director of Personnel
U.S. Treasury Department
Washington 25, D.C.

Mr. A. J. Schaffer
Director, Personnel Division
Internal Revenue Service
Washington 25, D.C.

Mr. John F. Griner
National President
American Federation of Government Employees, AFL-CIO
900 F Street, N.W.
Washington 4, D.C.

District Director
Internal Revenue Service
312 North Spring Street
Los Angeles, California 90012

[Filed May 22, 1964]

ANSWER

First Defense

The Court lacks jurisdiction over the subject matter of the complaint.

Second Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Third Defense

Answering specifically the numbered paragraphs of the complaint, defendant avers as follows:

1. He denies the allegations of paragraph 1.

2. He admits the allegations of paragraph 2.

3. He admits the allegation of the first sentence of paragraph 3, and denies the remaining allegations.

4.5.6. He admits that on January 17, 1962 the President of the United States promulgated Executive Order 10988, 27 F.R. 551, and

refers the Court to the Executive Order itself for the accurate wording thereof.

7. He denies the allegations of paragraph 7.

8. He admits that he promulgated and published section 13-A, Chapter E-2, Treasury Personnel Manual, effective July 2, 1962, a certified copy of which will be furnished the Court.

9.10. He admits the allegations of paragraphs 9 and 10.

11.12. He denies the allegations of paragraphs 11 and 12 except that he admits that criminal investigators will not be permitted to vote.

13. He denies that a justiciable controversy exists between plaintiff and defendant and avers that the decision made by defendant on the issue raised by plaintiff herein is one which is his sole responsibility and is final and proper.

David C. Acheson
United States Attorney

Charles T. Duncan
Principal Assistant United States Attorney

Joseph M. Hannon, Assistant
United States Attorney

Ellen Lee Park, Assistant
United States Attorney

[Filed August 13, 1964]

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. The allegations in paragraph number 1 of the original complaint filed herein are hereby realleged and incorporated herein by reference.

2. The allegations in paragraph number 2 of the original complaint filed herein are hereby realleged and incorporated herein by reference.

3. The allegations in paragraph number 3 of the original complaint filed herein are hereby realleged and incorporated herein by reference.

4. The allegations in paragraph number 4 of the original complaint filed herein are hereby realleged and incorporated herein by reference.

5. The allegations in paragraph number 5 of the original complaint filed herein are hereby realleged and incorporated herein by reference.

6. The allegations in paragraph number 6 of the original complaint filed herein are hereby realleged and incorporated herein by reference.

7. The allegations in paragraph number 7 of the original complaint filed herein are hereby realleged and incorporated herein by reference.

8. The allegations in paragraph number 8 of the original complaint filed herein are hereby realleged and incorporated herein by reference.

9. The allegations in paragraph number 9 of the original complaint filed herein are hereby realleged and incorporated herein by reference.

10. The allegations in paragraph number 10 of the original complaint filed herein are hereby realleged and incorporated herein by reference.

11. Plaintiff's exclusion of the said criminal investigators from coverage of Executive Order 10988, through promulgation of the aforesaid regulation and its application by his agents to the criminal investigators within the Los Angeles District constitutes a refusal on the part of Defendant to follow and abide by the terms of Executive Order

10988, and specifically Section 16 thereof. Neither criminal investigators generally nor those in the Los Angeles area are engaged in any operation or assignment for the United States Government whereby their inclusion within the program contemplated by the said Order would imperil considerations of national security or be incompatible therewith. Instead, their principal function is to gather data pertinent to criminal tax fraud prosecutions; and neither this nor any work incident thereto involves protection against internal subversion of the nation or foreign aggression.

12. The instant action arises under the laws of the United States in that the Defendant's refusal to permit criminal investigators to vote in the forthcoming Los Angeles election flouts the exclusionary standard of the aforesaid Executive Order, by which Defendant is bound, deprives both the Plaintiff and the criminal investigators of their legal rights thereunder, and further deprives Plaintiff and the criminal investigators of due process of law as guaranteed by the United States Constitution.

13. Between Plaintiff and Defendant there is at present, genuine and irreconcilable dispute. Plaintiff has attempted in vain to persuade Defendant to modify, revise or rescind his exclusionary regulation as cited above. Plaintiff, moreover, has sought to avail itself of the advisory arbitration procedures provided in Section 11 of the said Executive Order 10988, having requested the Secretary of Labor to nominate an impartial arbitrator to render an opinion as to the propriety of the Defendant's administrative ouster of criminal investigators from the benefits of the collective bargaining system contemplated by the Order. The Secretary of Labor has denied the request for advisory arbitration. A copy of his decision is incorporated herein as exhibit "C". Plaintiff has therefore exhausted all conceivable modes of administrative review of the existing controversy between it and Defendant.

WHEREFORE, premises considered, Plaintiff prays

1. That this Court interpret and declare Plaintiff's rights under Executive Order 10988 and the United States Constitution.

2. That this Court declare the Defendant's administrative exclusion of Internal Revenue Service criminal investigators to be an impermissible and improper application of Section 16 of the said Order, hence unlawful and a deprivation of Plaintiff's Constitutional rights.

3. That this Court issue an order restraining Defendant and his agents from conducting an election within the Los Angeles District of the Internal Revenue Service, to determine whether plaintiff or another employee organization shall be the exclusive representative therein, unless and until this Court has determined whether criminal investigators may vote in the said election.

4. For such other relief as to this Court seems just and proper.

Glenn R. Graves
Attorney for Plaintiff

ANSWER TO AMENDED COMPLAINT

For answer to the amended complaint, defendant incorporates herein and makes a part hereof by reference his first, second and third defense to the complaint.

David C. Acheson
United States Attorney

Charles T. Duncan, Principal
Assistant United States Attorney

Joseph M. Hannon, Assistant
United States Attorney

Ellen Lee Park, Assistant
United States Attorney

[Certificate of Service, ___ Aug. 1964]

[Filed October 16, 1964]

MOTION TO DISMISS
OR FOR SUMMARY JUDGMENT

Defendant through his attorney, the United States Attorney for the District of Columbia, respectfully moves the Court to dismiss the complaint for lack of jurisdiction or, in the alternative, upon consideration of the pleadings, affidavits and certified copies of documents filed herein to grant judgment for him on the ground that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

Incorporated herein and made a part hereof are affidavits of A.E. Weatherbee, Assistant Secretary for Administration of the United States Treasury Department; Amos N. Latham, Jr., Director of Personnel, and H. Alan Long, Director, Intelligence Division, Internal Revenue Service, and certified copies of documents from the Treasury Department related to this cause.

David C. Acheson
United States Attorney

Charles T. Duncan, Principal
Assistant United States Attorney

Joseph M. Hannon
Assistant United States Attorney

Ellen Lee Park
Assistant United States Attorney

STATEMENT OF MATERIAL FACTS
PURSUANT TO LOCAL RULE 9(h)

The material facts involved herein are set forth in the pleadings and in the affidavits and certified copies of Treasury Department docu-

ments attached hereto, and they may be summarized for purposes of this motion as follows:

1. The Secretary of Treasury approved a determination made by his duly authorized agents in 1962 that the duties and responsibilities of employees in the Treasury Department law enforcement entities (including the Intelligence Division of the Internal Revenue Service) were such that the provisions of Executive Order 10988 could not be applied to them in a manner consistent with national security requirements and considerations. This determination was issued by the Secretary of Treasury Douglas Dillon as Treasury Department regulation 13-A, Ch. E-2, Treasury Personnel Manual, effective July 1, 1962. (Affidavits of Weatherbee, Latham and Long; cert. rec. Treas. Dept.)

2. Plaintiff, an unincorporated association composed of Internal Revenue Service employees, by letter dated December 7, 1963 from its Los Angeles Chapter to the Director of Internal Revenue Service in that city, requested that Internal Revenue Service criminal investigators "be permitted to vote and be afforded the full protection of the employees organizational rights covered by Executive Order 10988." (Exh. A to complaint)

3. The only "criminal investigators" employed in the Internal Revenue District of Los Angeles, California are Special Agents, Intelligence Division, Internal Revenue Service. (Affidavit of Long)

4. By letter of December 18, 1963, the Los Angeles Director of the Internal Revenue Service advised plaintiff, in part, as follows:

> "Based on Section 16 of Executive Order 10988, the Secretary of the Treasury has determined that employees performing intelligence, investigative or security functions are excluded from the provisions of the Order (except Section 14). Therefore, the provisions of the Executive Order (except Section 14) do not apply to Revenue Service employees in Inspection, Intelligence, and Alcohol and Tobacco Tax Enforcement activities.

Since such employees are excluded, they cannot be permitted to vote in an election."

(Cert. rec. Treas. Dept.)

5. On December 30, 1963 plaintiff, through its attorney, asked the Director of Personnel, Treasury Department, for a written determination as to whether the District Director's decision represented a proper application of existing Treasury regulations, and was advised on December 31, 1963 that the District Director had correctly interpreted the regulations of the Treasury Department in this respect. (Cert. rec. Treas. Dept.; Exh. B, complaint)

6. Plaintiff sought to avail itself of the advisory arbitration procedure provided in Section 11 of Executive Order 10988, and was advised by the Labor Department that the question of exclusion of criminal investigators by the Secretary of the Treasury is not subject to arbitration under Section 11; that Section 16 determinations are clearly the responsibility of the head of each agency or department and not subject to review under the Order. (Exh. C, Complaint)

David C. Acheson
United States Attorney

Charles T. Duncan, Principal
Assistant United States Attorney

Joseph M. Hannon
Assistant United States Attorney

Ellen Lee Park
Assistant United States Attorney

[Gov't's Exhibit No. 1]

AFFIDAVIT OF A. E. WEATHERBEE

A. E. Weatherbee, first being duly sworn, deposes and states that:

1. I am the Assistant Secretary for Administration of the U.S. Treasury Department. As such, I have been delegated authority by Douglas Dillon, Secretary of the Treasury, in Treasury Department Order Nos. 177-19 and 177-19 (Revision No. 1), dated September 1 and December 4, 1961, respectively, to take final action on matters pertaining to the employment, direction, and general administration of personnel under the Treasury Department, with certain exceptions not pertinent here. These Orders also provide for redelegation of authority.

2. In Treasury Department Administrative Circular No. 46, dated September 1, 1961, I delegated to the Director of Personnel of the Treasury Department the authority to formulate policies for personnel administration for employees of the Department.

3. On or about June 19, 1962, Amos N. Latham, Jr., Director of Personnel, forwarded to me the proposed Chapter E-2, Treasury Personnel Manual which implemented Executive Order No. 10988 and which he had readied under said delegated authority. I noted the determination he had made, under Section 16 of the Order, to the effect that the provisions of the Order (except Section 14) could not be applied to certain Treasury law enforcement entities (including the Intelligence Division of the Internal Revenue Service) because of national security requirements and considerations, and the definition of the term "national security" that he had adopted. I approved both his determination and his definition of "national security." This determination was issued as a Treasury Department regulation, being Section 13A, Chapter E-2, Treasury Personnel Manual, and was approved by Secretary of the Treasury Douglas Dillon.

A. E. Weatherbee

[Notarial Certificate, dated Sept. 18, 1964]

[Gov't's Exhibit No. 2]

AFFIDAVIT OF AMOS N. LATHAM, JR.

Amos N. Latham, Jr., first being duly sworn, deposes and states that:

1. I am the Director of Personnel of the U.S. Treasury Department. As such, I have the responsibility, under Treasury Department Administrative Circular No. 46, dated September 1, 1961, for the administration and direction of the Department's program for personnel administration. The Circular also vests in me the authority to formulate policies and to establish procedures for personnel administration for employees of the Department.

2. In connection with said responsibility and authority, it was my duty to ready, for issuance, appropriate policies, rules and regulations for the implementation within the Department of Executive Order No. 10988, "Employee-Management Cooperation in the Federal Service," as required by Section 10 of said Order.

3. Section 16 of the Order provides, in part, that the Order (except Section 14 thereof) shall not apply to any entity within an agency, primarily performing intelligence, investigative, or security functions "if the head of the agency determines that the provisions of this Order cannot be applied in a manner consistent with national security requirements and considerations." In formulating the policy as to which, if any, entitties within the Department primarily performing such functions should be excepted from the Order because of "national security" requirements and considerations, I adopted for the term "national security" the definition of that term in Treasury Department Order No. 82, Revised, dated April 10, 1962, "The Security Program of the Treasury Department Under Executive Order No. 10450." Section 1 (i) of that document states:

> "(i) 'National security' means the protection and preservation of the military, economic, and pro-

> ductive strength of the United States, including the security of the Government in domestic and foreign affairs, against or from espionage, sabotage, and subversion, and any and all other illegal acts designed to weaken or destroy the United States."

4. Using that definition, and after consultation with appropriate officials of the several Treasury Department law enforcement entities, I determined that the duties and responsibilities of employees in those entities (including the Intelligence Division of the Internal Revenue Service) were such that the provisions of the Order could not be applied thereto in a manner consistent with national security requirements and considerations.

5. This determination was incorporated as Section 13A of proposed Chapter E-2 (regulations issued under Section 10 of Executive Order No. 10988), Treasury Personnel Manual. Proposed Chapter E-2 was then transmitted to A. E. Weatherbee, Administrative Assistant Secretary, U.S. Treasury Department, for his consideration.

Amos N. Latham, Jr.

[Notarial certificate, dated Sept. 18, 1964]

[Gov't's Exhibit No. 3]

AFFIDAVIT OF H. ALAN LONG *

H. Alan Long, first being duly sworn, deposes and states that:

1. I am the Director, Intelligence Division, Internal Revenue Service. A such, I have knowledge of the duties and responsibilities of Special Agents, Intelligence Division, Internal Revenue Service, the only "criminal investigators" employed in the Internal Revenue District of Los Angeles, California.

* This document is printed as part of the joint appendix over appellant's objection.

2. Special Agents of the Intelligence Division (including those assigned to the Los Angeles District), in addition to their duties with respect to tax fraud investigations, are required (as the occasion demands) to perform such duties as:

(a) Cooperation with the Federal Bureau of Investigation and the Central Intelligence Agency on security cases;

(b) Protection of the President of the United States; and

(c) Cooperation with Defense Department security agencies.

3. Because the duties of Special Agents require them to have, from time to time, access to classified matter and information, all Special Agents hold "Confidential" security clearances and many hold "Top Secret" and "Secret" security clearances.

H. Alan Long

[Notarial Certificate, dated Sept. 15, 1964]

[Gov't's Exhibit No. 4]

13. Exceptions to Coverage Under These Regulations

A. Employees Performing Intelligence, Investigative or Security Functions

In accordance with Section 16 of Executive Order No. 10988), provisions of that Order (except Section 14) shall not apply to any bureau or entity within a bureau primarily performing intelligence, investigative or security functions when compliance with these provisions would be incompatible with national security consideration. Specifically, the Secretary has determined that the rights conferred by all provisions of Executive Order 10988, except Section 14, shall not apply to the Customs Agency Service in the Bureau of Customs; the Inspection Service, the Intelligence Division and the Enforcement Branch

of the Alcohol and Tobacco Tax Division in the Internal Revenue Service; the Bureau of Narcotics; the United States Secret Service; the White House Police; the Security Control Branch of the Bureau of Engraving and Printing; the Intelligence Division of the United States Coast Guard; and the Office of Law Enforcement Coordination and the Office of Security in the Office of the Secretary. This does not prohibit membership in an employee organization. Further, it is the policy of the Department to permit the maximum extent of employee participation in employee organizations which is compatible with national security considerations. Accordingly, where the head of the bureau concerned so determines, employees other than management officials in the above-named bureaus or organizational entities thereof may be afforded the privilege of holding office in an employee organization and of representing such organization in consultations and negotiations on matters other than those relating solely to employees performing intelligence, investigative or security functions. In addition, the heads of bureaus are authorized to grant to clerical and other employees in the bureaus or entities referred to above whose duties are not primarily of an investigative, security or enforcement nature any of the privileges under the provisions of Executive Order 10988 which they determine may be extended consistent with national security requirements and considerations.

[Filed January 28, 1965]

ORDER

This cause having come on for hearing on defendant's motion to dismiss or for summary judgment and upon consideration thereof and of the points and authorities in support of plaintiff's motion for summary judgment, which plaintiff requested the Court to treat as a memorandum of points and authorities in opposition to defendant's motion,

and of argument of counsel, it is by the Court this 28th day of January, 1965.

ORDERED that defendant's motion to dismiss be and it hereby is granted and that the complaint herein be and it hereby is dismissed.

/s/ Burnita Shelton Matthews
Judge

[Certificate of Service, dated __ Jan. 1965]

[Filed March 8, 1965]

NOTICE OF APPEAL

Notice is hereby given this 8th day of March, 1965, that the National Association of Internal Revenue Employees, an unincorporated association, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 28th day of January, 1965 in favor of the defendant Douglas Dillon, Secretary of the Treasury, against said plaintiff National Association of Internal Revenue Employees.

Glenn R. Graves
Attorney for National Ass'n
of Internal Revenue Employees

11-2-65
(3)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

19,309

~~No. 18,882~~

MANHATTAN-BRONX POSTAL UNION, an unincorporated association, and THEODORE A. PETRIE, individually on behalf of himself and on behalf of all others similarly situated, APPELLANTS

v.

JOHN A. GRONOUSKI, individually and as a Postmaster General of the United States, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ELLEN LEE PARK,
JEROME NELSON,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Whether the District Court has jurisdiction over a suit brought by a union seeking to compel the Postmaster General to grant it "exclusive" recognition, under the terms of an Executive Order, as the bargaining representative of certain postal employees?

2. The relevant portion of the Order provides that a union is entitled to exclusive recognition when designated by "a majority of the employees in such unit." The Postmaster General promulgated a rule under the Order whereby an absolute majority of all eligible employees can always designate a union as exclusive recognition; he also ruled that a simple majority of those voting can make the same designation provided 60% of all eligibles participate in the election. The question is whether this rule is in flat violation of the Order and thus confers jurisdiction; or whether, assuming the existence of jurisdiction, the rule is unreasonable?

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the District Court alternatively dismissing appellants' complaint for want of jurisdiction or granting summary judgment to appellee in the event jurisdiction did exist. The complaint, predicating jurisdiction on an Executive Order, sought to compel the Postmaster General to grant appellant "exclusive" recognition as the bargaining representative of certain Post Office employees.

On January 17, 1962, President Kennedy promulgated Executive Order 10988 (27 F. R. 551, J.A. A-2-A-8) which established the outlines for a limited system of collective bargaining between the federal government and its employees. The Order provided that a union might be accorded three types of recognition: informal, formal, or exclusive. Exclusive recognition was defined as conferring upon the particular union the power "to act for and to negotiate agreements covering all employees in the unit" (Sec. 6(b), E.O. 10988, J.A. A-6). In order to achieve exclusive status it must have been determined by the agency that the particular union "has been designated or selected by a majority of the employees of such unit" (Sec. 6(a), E.O. 10988, J.A. A-5). The head of each agency was required to issue "policies and procedures with respect to recognition of employees organizations" (Sec. 10, E.O. 10988, J.A. A-6).

On March 23, 1962 a discussion was held at the Post Office Department, Washington, D.C. between an Assistant Postmaster General and the President of the National Postal Union, which is the national affiliate of appellant union. At that discussion it was understood that

> "Those receiving an excess of 10% but less than the majority of the votes would receive formal recognition, and those employee organizations receiving the majority would receive exclusive recognition. It is to be understood that the percentage figures relate to the total number of employees eligible to vote in a unit and *not* to the number of votes actually cast" (emphasis in original) (see letter attached as Exhibit K to Amended and Supplemental Complaint)

On April 24, 1962 the U.S. Civil Service Commission issued a letter promulgating the so-called 60% rule, which in turn had been recommended by the President's Temporary Committee appointed under the Order itself (J.A. 54). The rule provides that a union is always recognized as exclusive representative if it obtains 51% of the total eligible votes. If, however, an election is

"representative", in that 60% of the eligibles participate, then a union may be accorded exclusive status by carrying a simple majority of the votes cast.

On May 25, 1962 the Post Office Department issued a "Postal Bulletin", required to be displayed on all employee bulletin boards and other prominent places. This Postal Bulletin, among other things, announced and explained the 60% rule noted above (J.A. 50-51).

During the fall of 1963 the Post Office Department undertook to determine by an "authorization card" system whether certain unions would be accorded exclusive recognition in certain New York postal units.

On January 7, 1964 the appellant union and appellant Petrie (a member thereof) filed the first of three complaints in the District Court. The Postmaster General was named as defendant in all complaints. The first complaint, wherein appellants sought a declaratory judgment and injunctive relief, attacked the determination which the Department sought to make on two grounds. First, it was alleged that certain professional employees were members of a rival union which was desirous of certification. Second, it was contended that the "authorization card" system was unfair since duplication of names on various cards was operating so as to nullify certain votes.

On January 23, 1964 the Department issued a Postal Bulletin which provided in pertinent part that a union would be accorded exclusive recognition "based upon a showing of 50 percent plus 1 of the total eligibles in the particular craft union involved" (Exhibit L, attached to Amended and Supplemental Complaint).

On February 3, 1964 appellants filed an Amended and Supplemental Complaint alleging that the rival union had not complied with an initial requirement of showing 30% support prior to seeking exclusive recognition (J.A. 7-8); that two professional employees were members of the rival union in violation of the Executive Order (J.A. 8-10); that a requirement of absolute majority was invalid and that simple majority rule should apply to a counting of the authorization cards (J.A. 10-13); and

that the authorization card procedure did not accurately reflect the desires of the electorate (J.A. 13-14).

On February 14, 1964 the parties entered into a stipulation which, in pertinent part, provided that the status quo would be maintained subject to the right of appellee to conduct an election by secret ballot. It was also agreed that appellants might challenge the election if they desired (J.A. 20-22).

On April 15, 1964 at a meeting with representatives of appellant union, the Post Office Department agreed to hold a secret ballot election (J.A. 32). The election was held during the period May 14 through May 28, 1964 and the results were tabulated on June 4, 1964 (J.A. 32, 37). The results in the New York City Unit [1] showed that out of 6536 eligible voters, a total of 3729 or 57.07% participated in the election. Appellant union received 2493 of these votes (J.A. 37, 38).

In accordance with the 60% rule, appellee on June 19, 1964 notified appellant union that as to the New York City Unit, it was entitled to formal but not exclusive recognition. At the same time appellee declined to waive the 60% rule, explaining that virtually all ballot kits had reached the employees and only 13 had been returned as undeliverable (J.A. 38-40).

On June 26, 1964 appellants filed a Supplemental Complaint which in substance alleged that the application of the 60% rule was arbitrary, capricious and unlawful under the Executive Order. Appellants sought a judgment declaring them to be exclusive representatives of the employees in the unit involved. They also sought a temporary restraining order and certain injunctive relief (J.A. 26-30).

On July 1, 1964 appellee moved for summary judgment, submitting documents from the Civil Service Commission and the Post Office Department showing the 1962 an-

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[1] Up until this time appellants had also been seeking exclusive status in a Bronx unit. However, the results of the secret ballot election in that unit were such that appellee recognized the union as exclusive representative in the Bronx (J.A. 40).

nouncements and explanations of the 60% rule (J.A. 40-54). On July 2, 1964 the District Court (Walsh, J.) ordered the complaint dismissed, ruling that the Court "lacks jurisdiction over this cause, and that moreover if it had jurisdiction defendant would be entitled to judgment as a matter of law." (J.A. 55).

SUMMARY OF ARGUMENT

District Courts generally are without jurisdiction to review representation disputes of the kind here presented. The reasons behind this rule, established under the National Labor Relations Act and the Railway Labor Act, are applicable to disputes under the President's Executive Order. The rule should apply *a fortiori* to a union such as appellant which has a.) lost much less in terms of bargaining power than its counterpart in the private economy and b.) has achieved "formal" albeit not "exclusive" recognition. The requirement that there must be 60% participation where a simple majority is to carry a representation election is not clearly contrary to the terms of the Executive Order which speaks merely of "a majority of the employees in such unit" and on its face looks to an absolute majority. Hence the case is not reviewable under the exception deliniated in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and like decisions.

The complaint is, in any event, barred by the doctrine of sovereign immunity. This is so because the United States has not consented to suit and because the judgment sought would "interfere" with or "affect the public administration of government agencies."

The "60%" rule is not an unreasonable exercise of discretion. The requirement that an election of the kind here involved be "representative" of the relevant employees is well grounded in federal labor law. Because of the differences between the federal government and the private economy, the head of an agency may reasonably require a greater degree of participation than that re-

quired in private industry if an election is to be carried by a simple majority.

ARGUMENT

I. The District Court correctly ruled that it had no jurisdiction over this cause.

A. *The general rule as to the reviewability of representation disputes should apply here.*

Under settled rules, the district courts are generally without jurisdiction to review representation proceedings conducted under the National Labor Relations Act (*A.F.L.* v. *N.L.R.B.*, 308 U.S. 401 (1940); *Boire* v. *Greyhound Corporation*, 376 U.S. 473 (1964) or certification proceedings under the Railway Labor Act (*Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943)). In our view, this same jurisdictional rule should apply *a fortiori* to a union seeking exclusive recognition under Executive Order 10988.

The reasons underlying this general jurisdictional rule are equally applicable to cases arising under the Order. Just as under the N.L.R.A. and the Railway Labor Act, there is an element of expertise entering into the decision making process. Under Section 11 of the Order, a dispute over the appropriateness of a bargaining unit or, as here, a majority determination is subject to advisory arbitration at the hands of one or more federal mediators nominated from the National Panel of Arbitrators. Then too, the avoidance of frustrating litigous delay—a dominant theme in cases laying down the rule of nonreviewability—is just as desirable within the federal government as within the private economy. Case by case litigation under the Executive Order could only breed uncertainty and inject a note of indecision into the very relationships which the President sought to create and foster. To open the courts to representation disputes arising within government would render the particular employer-department

unable to deal meaningfully with any union until all litigation had run its course.[2]

As a logical matter, a union of government employees should have no greater access to the courts than a union representing private employees. A "government union" is indeed a much weaker entity than its counterpart in the private economy. As President Kennedy stated, in reviewing the Task Force reported which culminated in the Order:[3]

> "The report clearly recognizes that Federal employees do not have the right to strike, that both the union shop and the closed shop are inappropriate to the Federal Government, that where salaries and other conditions of employment are fixed by Congress these matters are not subject to negotiation, and that all agreements must be consistent with merit system principles."

Thus it is obvious that a union unsuccessful in an effort to represent private employees has "lost" far more than a union such as appellant, which seeks to represent government employees.[4] Since the union suffering the more

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[2] A union such as that at bar, which failed to gain exclusive recognition but which secured formal recognition, would have a dubious status during the pendency of litigation. Management would be unable to deal with the union in its "formal" state because of uncertainty as to whether that same union might be judicially deemed an exclusive representative. Similarly a union which successfully obtained a waiver of the 60% rule and gained exclusive recognition would be at the mercy of any rival union which decided to take the matter to court. Then, too, there would be innumerable disputes over the appropriateness of bargaining units; all of which disputes, even after arbitration by impartial experts, would then be submitted to Federal judges.

[3] "A Policy for Employee-Management Cooperation in the Federal Service" Report of the President's Task Force on Employee-Management Relations in the Federal Service, (Govt. Printing Office, 1961), inside cover page. This authority is hereinafter cited as "Task Force Report."

[4] Indeed a representation proceeding under the Order is by no means the "all or nothing" proceeding employed in the private economy. In the latter sphere, a losing union thereafter has no

severe defeat has no access to the courts, it should follow that the "government union" has no greater rights.

Both the Order and the Task Force Report were the product of men quite familiar with the developed rules of collective bargaining.[5] Neither document makes the slightest suggestion as to the desirability of legislation which would confer judicial review. Yet when the Task Force felt it necessary to request legislation to implement the proposed program it did so clearly:

> "Although the Task Force has endeavored to confine its recommendations to matters within the range of executive authority, the potential importance of the withholding of dues is such as to warrant an exception. This is a matter which must be authorized by law. The Task Force accordingly recommends that the President propose legislation to the Congress that would provide such authorization." (Task Force Report, p. 21).

This legislative recommendation was noted by the President in his "Statement" accompanying the Report (inside cover page). Under these circumstances, then, we think it plain that silence on the desirability of legislation to authorize judicial review may be regarded as a positive indication that such review was simply not intended.[6]

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representation status at all. In Government, on the other hand, a union which is not accorded "exclusive" recognition may well qualify for "formal" recognition under Section 5 of the Order and thereby achieve the right of consultation with management. That is precisely what happened to the appellant union.

[5] The President, when a Senator, was an active member of the Senate Committee on Labor and Public Welfare. He was Senate floor manager of the bill which became the Labor Management Reporting and Disclosure Act of 1959. Secretary Goldberg, Task Force Chairman, had been a distinguished practitioner in the field of labor law, who argued and/or briefed several significant labor cases in the Supreme Court. See e.g. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Labor Board* v. *Coca-Cola Bottling Company*, 350 U.S. 264 (1956); *N.L.R.B.* v. *United Steelworkers*, 357 U.S. 357 (1958).

[6] Compare *Panama Canal Co.* v. *Grace Line Inc.*, 356 U.S. 309, 319, fn. 4 (1958) where the Court held that the question of toll

An intent to preclude review is further apparent in Section 11 of the Order, which, as noted, provides for advisory arbitration of representation questions. Such provision for an administrative remedy also supports the conclusion that this particular remedy was intended to be exclusive. *Switchmen's supra.* at p. 301; *United States* v. *Babcock*, 250 U.S. 328, 331 (1919).

Appellants argue that they have "rights" under the Order and that judicial access must be a necessary corollary. "However, even where a complainant possesses a claim to executive action beneficial to him, created by federal statute, it does not necessarily follow that actions of administrative officials, deemed by the owner of the right to place unlawful restrictions upon his claim, are cognizable in appropriate federal courts of first instance." *Stark* v. *Wickard*, 321 U.S. 288, 306 (1944). Where no vested legal right is involved the constitution does not demand review and the assertion of the right may be surrounded with such limitations as its creator may impose. *Stark, supra; Estep* v. *United States*, 327 U.S. 114, 120 (1946); *United States* v. *Babcock*, 250 U.S. 328, 331 (1919). It is quite clear that the "right" to be an exclusive bargaining agent springs not from the Constitution or from the common law, but is purely a creature of statute subject to such conditions as the legislature may devise. *Fay* v. *Douds*, 172 F.2d 720, 724 (C.A. 2, 1949; opinion by L. Hand, J.); *New Bedford Loomfixers Union* v. *Alpert*, 110 F.Supp. 723, 727 (D.Mass. 1953). Similarly the "right" of a union to gain exclusive recognition amongst federal employees has no basis beyond that of the Executive Order itself. Accordingly, the conferring of "rights" in the order certainly does not guarantee access to federal courts. Nor could the order confer jurisdiction on a court without legislative action.

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fixing under a statutory formula was nonreviewable. In the course of the opinion it was noted that a bill purporting to confer judicial review of the matter had never come to a vote.

B. *The Postmaster General's decision here was well within his authority under the Order and thus the case involves no exception to the general rule of non-reviewability.*

In *Leedom* v. *Kyne*, 358 U.S. 184 (1958) the Court recognized an exception to the jurisdictional rule precluding review of representation proceedings. Jurisdiction was sustained where the Board had acted "in excess of its delegated powers and contrary to a specific prohibition in the Act" (at p. 188). Subsequent decisions have stressed the narrow confines of the exception. In *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 16-17 (1963) the Court carefully pointed out that its decision there was "not to be taken as an enlargement of the exception in *Kyne*" and reiterated the fact that *Kyne* dealt with Board action which was "in excess of its delegated powers and contrary to a specific prohibition." Only last Term in *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 481 (1964) the Court referred to "the painstakingly delineated boundaries of *Kyne*" and went on to say that "the *Kyne* exception is a narrow one, not to be extended to permit plenary district court review * * * in certification proceedings * * *." Similarly this Court has held that for jurisdictional purposes in this area, the action sought to be reviewed must be "arbitrary and capricious" (*Miami Newspaper Printing Pressmen's Union* v. *McCulloch*, 116 U.S. App. D.C. 243, 248, 322 F.2d 993 (1963)); or "clearly contrary" to law (*WES Chapter* v. *N.M.B.*, 114 U.S. App. D.C. 229, 232, 314 F.2d 234 (1962)); or "in flat violation" of law (*UNA Chapter* v. *N.M.B.*, 111 U.S. App. D.C. 121, 124, 294 F.2d 905 (1961), *cert. denied*, 368 U.S. 956). Applying this strict standard of reviewability to the facts of the instant case, there is plainly no jurisdictional basis for the suit.

Appellants seeks to establish jurisdiction on the theory that the pertinent language of the Order—"a majority of the employees of such unit"—commands but one construction. In our view the language is not so clear; rather it

operates so as to impose upon the agency head the duty of interpretation—a duty consistent with the existence of discretionary power, not reviewable in the courts. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317 (1958).

The phrase could well be construed literally to require an absolute majority of all eligible employees. Indeed this was the construction first adopted by appellee in 1962 and in January of 1964.[7] Significantly, under this construction, which is the one clearest from the face of things, appellant union would also have lost. Instead of requiring an absolute majority in all instances, however, appellee sought to liberalize this seemingly harsh standard by allowing a simple majority to carry the election in cases where 60% of the eligibles had participated. In essence, then, appellants are seeking to sustain jurisdiction because the Postmaster General adopted a policy less severe than that called for by the bare language of the Order itself. In this context there has been, therefore, no plainly unlawful action such as to bring this case within the exception to the rule of non-reviewability.

Appellants concede the validity of a "quorum" concept in a representation election (Br. pp. 21-22). Once that concept be conceded, as it must be, then the precise formulation of a rule as to the quorum is certainly not "in excess" of the powers of the agency head or in "flat violation" of the Order. Indeed the point seems settled by the holding in *Radio Officers' Union* v. *N.M.B.*, 86 U.S. App. D.C. 319, 181 F.2d 801 (1950), wherein this Court refused to review a determination made by the Board under a 51% "quorum" rule.[8] There the Court stressed the discretionary function of the Board and rejected the contention that the "quorum" rule was arbitrary, capricious and contrary to law. In the course of the decision, reference was made to an opinion of the Attorney General,

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[7] See Exhibits K and L attached to Amended and Supplemental Complaint.

[8] There 86 out of 183 eligibles participated in the election. Seventeen ballots were "void" and the remaining 69 were cast in favor of the appellant union.

the pertinent text of which is persuasive in the context at bar:

> "In the exercise of its discretion in these matters, the Board may for example, find it advisable to limit the application of the principle [of majority rule] to cases in which the participation in the election is sufficiently substantial and representative * * *"
> (40 Op.A. G. 541, 544-545, (1947)).

The relevant provision of the Railway Labor Act, under which the 51% "quorum" concept is followed, is no more or less ambiguous than that in the Executive Order. Compare 45 U.S.C. 152, Fourth: "The majority of any craft or class of employees shall have the right to determine who shall be the representative * * *." Nor is there any significant difference between the powers conferred upon the Board by the statute and the powers conferred upon the agency head by the Executive Order in question.[9] The Board is given the "duty" of investigating a representation dispute and certifying the winner (45 U.S.C. 152, Ninth). In the course of such investigation, the Board is authorized "to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives * * *" (45 U.S.C. 152, Ninth). Finally the Board is empowered to "establish the rules to govern the election * * *" (45 U.S.C. 152, Ninth). Turning to the Executive Order at bar, the provisions are parallel. The agency head is made "* * * responsible for determining in accordance with this order

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[9] It may be argued that the N.M.B. possesses a certain expertise and thus occupies a different status than an agency head. However this distinction is largely without meaning. There is every reason to believe that determinations by an agency head under the Order are made after full consultation with trained personnel "experts". Particularly is this so in the Post Office Department which has a long background of dealings in the field of labor relations (see Task Force Report, p. 2). In any event expert services are made available under Section 11 of the Order which, as noted, provides for the use of Federal mediators in an advisory capacity.

* * * by an election or other appropriate means, whether an employee organization represents a majority of the employees in such a unit * * * (Section 11, E. O. 10988). He is also required to issues "policies and procedures with respect to recognition of employee organizations" (Section 10, E. O. 10988).

If the promulgation of a 51% rule is not reviewable, then it is difficult to see why a 60% rule should have any different jurisdictional status. In either case the administrator, be it the N.M.B. as in *Radio Officers'* or the Postmaster General as in this case, has the power to certify the winner of a "representative" election.[10] What is "representative" in the Post Office Department is no more a question appropriate for judicial determination that what is "representative" in a railroad or airline. In the last analysis, the question is not unlike that of toll-fixing in *Panama Canal Co., supra;* it involves "nice issues of judgment and choice * * * which require the exercise of informed discretion." The *Kyne* exception as to reviewability has no application where the particular action arises out of the exercise of discretionary power. *International Association of Tool Craftsmen* v. *Leedom*, 107 U.S. App. D.C. 268, 276 F.2d 514 (1960), *cert. denied*, 364 U.S. 815. Since the Postmaster General here was exercising a discretion conferred upon him by the Order, and was not violating any mandatory provision thereof, his action is not reviewable.[11]

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[10] The concept of a "representative" election has also been applied under Section 9(a) of the National Labor Relations Act, which, in terms, calls for selection "by the majority of the employees in a unit" (29 U.S.C.). See *N.L.R.B.* v. *Central Dispensary and Emergency Hospital*, 79 U.S. App. D.C. 274, 276, 145 F. 2d 852 (1944), *cert. denied*, 324 U.S. 847. What is "representative" is apparently not established by any particular rule but is determined on a case by case basis by the N.L.R.B. See the Board decisions cited *infra* in discussion of the merits.

[11] We do not concede that action in direct violation of the Order would be reviewable in the absence of statute.

C. *The suit was barred under the doctrine of sovereign immunity.*

In substance appellant union seeks by this litigation to compel the Postmaster General to recognize it as the exclusive representative of certain employees. The judgment would result in a governmental obligation to enter into an agreement with appellant union. Moreover to the extent that negotiations would be allowed to take place during working hours, there would be a certain interference with government facilities and with the working time of certain employees. The concept of sovereign immunity applies under these circumstances, since judgment would "interfere with the public administration" (*Dugan* v. *Rank*, 372 U.S. 609, 620 (1963)), and would require "official affirmative action" such as to "affect the public administration of government agencies" (*Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963)). See also *United States ex rel. Brookfield Construction Co.* v. *Stewart*, No. 18,932, decided November 26, 1964, upholding a claim of sovereign immunity as against suit to compel the Capitol Architect to award a contract to a certain bidder. For the reasons noted *supra* the determination of the Postmaster General, by which exclusive recognition was denied to appellant union, was not in excess of his authority and there is therefore no exception to the rule of sovereign immunity.

II. The promulgation of a "60% rule" was a reasonable exercise of discretion.

As we have shown, the language "a majority of the employees of such unit" does not operate so as to preclude the requirement of a "quorum" in the election. *Radio Officers'*, *supra;* 40 Op. A. G. 541 (1947). See also *Decker* v. *Venezolana*, 103 U.S. App. D.C. 301, 258 F.2d. 153 (1958) further recognizing the validity of the National Mediation Board's "51%" rule.[12] The quorum re-

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[12] The rule was recently noted in *Association for Benefit of Non-Contract Employees* v. *N.M.B.*, 218 F. Supp. 114, 125 (1963)

quirement is but a codified aspect of the rule that an election to determine a bargaining representative must be "representative" of the electorate. This concept of a representative election is applied to proceedings conducted by the N.L.R.B. under the National Labor Relations Act. See *N.L.R.B.* v. *Central Dispensary, supra*: "The real test is whether the election is actually representative" (76 U.S. App. D.C. at 276). As a preliminary matter, the N.L.R.B. declines to conduct any election at all unless a union can establish that it "has been designated by at least 30% of the employees" in the unit. 29 C.F.R. Section 101.18 (1964). Moreover the Board has on numerous occasions voided elections which, because of the facts involved, were regarded as not sufficiently representative. See e.g.: *Rowe-Jordan Furniture Corporation*, 81 N.L.R.B. 190 (1949) (only 18 valid votes cast out of unit composed of 75 to 106 men); *Atlantic Basin Iron Works, Inc.* 72 N.L.R.B. 508 (1947) (only one vote in unit composed of 22 men); *Weldmaster Company*, 56 N.L.R.B. 168 (1944) (only 18 votes in unit composed of 102 men).[13] On at least one occasion even Board members have differed over whether an election was representative. See *East Ohio Gas Company* 140 N.L.R.B. 1269 (1963). Thus, the requirement that an election be "representative", with or without reference to any determined "quorum", is well grounded in the federal law of collective bargaining.

Consequently the issue narrows to whether or not the difference between a 51% rule—which appellants con-

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affirmed per curiam sub nom. United Air Lines v. *N.M.B.*, —— U.S. App. D.C. ——, 330 F.2d 853 (1964), *certiorari granted on other issues*, No's. 138 and 139, October Term, 1964.

[13] Of course, the Board may, and frequently does, honor the results of a minority election. See *N.L.R.B.* v. *Deutsch Company*, 265 F.2d 473, 479-481 (C.A. 9, 1959), *cert. denied*, 361 U.S. 963 and cases there cited. The Board rejected an absolute 51% rule for reasons which are clearly inapplicable to the problem at bar. The Board reasoned that a 51% rule would place a premium on tactics of "intimidation", "sabotage", and "terrorism." *R.C.A. Manufacturing Company*, 2 N.L.R.B. 159, 176 (1936).

cede to be valid (Br. pp. 21-22)—and the 60% rule is so great as to constitute an arbitrary exercise of discretion. We think not.

The rule in question had its genesis in the President's Temporary Committee on the Implementation of the Federal Employee-Management Program (J.A. 44, 54). This Temporary Committee was composed of the Secretary of Labor, the Secretary of Defense, the Postmaster General, and the Chairman of the Civil Service Commission—all of whom were members of the original six man Task Force whose report produced the Executive Order in question. The Task Force spoke of exclusive recognition as deriving from "the majority of the employees in an appropriate unit" (Task Force Report, p. 14). Section 6 of the Executive Order adopts virtually the same language: "a majority of the employees of such unit." Since the 60% rule was promulgated by four of the six men who originally drafted the "majority" concept of exclusive recognition, and whose recommendations were adopted by the President, there is every reason for this Court to hold that the rule in question is well within the intent of the Executive Order.

The application to government employee-unions of a stricter quorum rule is not unreasonable. There are obvious differences between the government and private economy which justify the requirement of a higher standard of employee support before according exclusive recognition. Thus in the preamble to the Order in question the President noted that the degree of employee participation in employment policies was subject to "the paramount requirements of the public service." Under Section 9 of the Order it is possible that negotiations between the agency and the union might be conducted on government time. As the Task Force recommended:

> "At the present time, there is also virtual unanimous agreement that consultation between employee organizations and management should be conducted on official time. The Task Force is of the opinion

> that this practice should continue, inasmuch as management officials will always be in a position to control the amount of time involved." (Task Force Report, p. 20).

Of course the Task Force went on to say that where negotiations with a union recognized as exclusive become "burdensome" management may require that further meetings be held during non-working hours. However the fact remains that some working time is inevitably involved—if only until negotiations become "burdensome." Another consideration entering into the reasonableness of the rule in issue turns on the validity of the notion that those who do not participate "are presumed to assent to the expressed will of those voting." *Virginia Railway Company* v. *System Federation No. 40*, 300 U.S. 515, 560 (1937). As the Attorney General ruled with reference to the Railway Labor Act, there is discretion to limit the majority concept to an election in which participation has been "sufficiently substantial and representative" to warrant the above assumption (40 Op. A.G. 541 (1947)). Hence the National Mediation Board has determined that within its sphere 51% participation is enough. See *Radio Officers'*, *supra*. But again, what is true as to railroads or airlines, or any other private enterprise is not necessarily true as to government. As the Task Force found:

> "It is clear, for example, that there are many areas in the Federal Government in which civil servants have shown *little or no inclination* to join employee organizations or to enter into collective relationships with management officials" (Task Force Report, p. 7; emphasis added).

The election at bar illustrates this indifference. The total vote cast for unions—appellant union and its competitor—was only about 56% of the number of employees in the electorate (J.A. 37). Appellant union itself was supported by only about 38% of the men in the unit; yet seeks "exclusive" recognition, so as to be able to

speak for all 6535 men. Since the degree of interest among government workers is not necessarily as high as that in private industry, surely an agency head may require a sufficient show of interest before recognizing a given union as spokesman for all employees.

Finally we note that the 60% rule itself leaves room for discretion. An agency head has the power to determine that an election wherein "slightly less" than 60% participated was indeed a representative election (J.A. 45, 54), and on at least one occasion, the Postmaster General waived the rule and granted exclusive recognition to a union (J.A. 39).

Under all of these circumstances, then,—the paramount requirements of government service, the potential consumption of government time and taxpayers' money, and the traditionally lower degree of employee interest in representation—we submit that the 60% rule is not an unreasonable exercise of discretion.

CONCLUSION

WHEREFORE, it is respectfully submitted that the instant appeal be dismissed for lack of jurisdiction or, in the alternative, that the order of the District Court be affirmed.

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BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,309

NATIONAL ASSOCIATION OF INTERNAL
REVENUE EMPLOYEES, Appellant,

v.

DOUGLAS DILLON,
Secretary of the Treasury, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN C. CONLIFF, JR.
United States Attorney.

FRANK Q. NEBEKER,
ELLEN LEE PARK,
JEROME NELSON,
Assistant United States Attorneys.

(C.A. No. 683-64)

QUESTION PRESENTED

Whether in light of the decision in Manhattan-Bronx Postal Union v. Grounouski, No. 18882, decided July 29, 1965, the action was properly dismissed by the District Court for lack of jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,309
(C.A. No. 683-64)

NATIONAL ASSOCIATION OF INTERNAL REVENUE EMPLOYEES, Appellant,

v.

DOUGLAS DILLON, Secretary of the Treasury, Appellee.

MOTION TO DISMISS APPEAL

Now comes appellee, by his attorney the United States Attorney, and respectfully moves to dismiss the above appeal on the ground that the action was properly dismissed in the District Court. The lack of jurisdiction to review complaints arising under Executive Order 10988 has now been established by virtue of the unanimous decision of this Court in Manhattan-Bronx Postal Union v. Grounouski (No. 18,882), decided July 29, 1965.

/s/ JOHN C. CONLIFF, JR.
JOHN C. CONLIFF, JR.,
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER,
Assistant United States Attorney

/s/ JEROME NELSON
JEROME NELSON,
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed to attorney, Glenn R. Graves, Esq., 625 Washington Building, 15th and New York Avenue, N.W., Washington, D.C., 20005, this 29th day of July, 1965.

/s/ JEROME NELSON
JEROME NELSON,
Assistant United States Attorney